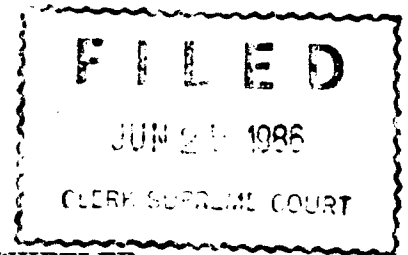


IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ANTONIA KATHRYN WHEELER
AND KENNETH BERNARD WHEELER



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Upon the Petition of)

ANTONIA KATHRYN WHEELER,)

Petitioner-Appellee,)

Filed June 25, 1986

And Concerning)

KENNETH BERNARD WHEELER,)

6-174
85-1726

Respondent-Appellant.)

Appeal from the Iowa District Court for Polk County (No. 48-28415) -
John N. Hughes, Senior Judge, and Gene L. Needles, Judge.

Respondent husband appeals from economic provisions of the parties' dissolution decree, asserting that (1) alimony should not have been awarded or, alternatively, the award was excessive in both amount and duration; and (2) petitioner should not have been awarded attorney fees. **AFFIRMED AS MODIFIED.**

Patrick H. Payton, Des Moines, for respondent-appellant.

Larry Seckington and Nancy C. Coon of Brick, Seckington, Bowers, Swartz & Gentry, P.C., Des Moines, for petitioner-appellee.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

PER CURIAM**242**

Petitioner Antonia Kathryn Wheeler and respondent Kenneth Bernard Wheeler were married on January 18, 1979. This was Antonia's second marriage, and she had two children, ages eight and nine, from her previous marriage. Kenneth did not adopt these children. Antonia and Kenneth had no children together. The parties are presently in good health and in their late thirties.

Antonia held a cosmetology license at the time of the marriage and had worked for Dorians Beauty Salon for seven to eight years. After the parties' marriage, Antonia left the salon for two years to become a homemaker and assist in Kenneth's business. Kenneth operated a small corporation entitled Wheeler Distributing, Inc., which engaged in the grain elevator construction business. During the first years of the parties' marriage, this business was successful. However, the business went bankrupt in 1984. Kenneth is also a licensed realtor and this was his sole source of income since the decline of his construction business. Antonia began working in a beauty salon again when Kenneth's business began to fail. In February of 1985, Antonia accepted full-time employment at the College of Osteopathic Medicine as a clerk-courier in the general service and receiving department. At the time of trial she was also working at the beauty salon on Thursday evenings and Saturdays. She had a combined gross income from these jobs of \$275 weekly, or a net income of \$133.75 per week, plus life and health insurance benefits through the college. At the time of trial, Kenneth was unemployed and had earned no income in 1985. He testified that he was still trying to learn the real estate business and had looked for construction jobs in Florida. During the marriage Kenneth's personal income went from as high as \$37,000 to \$19,000 in 1983 to \$13,500 in 1984. It is undisputed that the parties' assets had a negative value at the time of trial. Both parties were living with relatives.

The dissolution decree divided various items of personal property and awarded Kenneth the parties' home, valued at about \$86,000, subject to a federal tax lien of \$45,000 and a mortgage of \$66,000. He was also awarded his business assets, subject to substantial debt not dischargeable in bankruptcy. Antonia was awarded attorney fees of \$500 and alimony of \$200 per month for a two-year period, to cease at an earlier time if Antonia remarries or dies within the two-year period.

On appeal, Kenneth contends that the trial court erred in awarding alimony to Antonia or, alternatively, argues that the alimony award was excessive in amount and duration.

Our scope of review is de novo. Iowa R. App. P. 4. While the trial court's findings of fact are entitled to weight, especially in matters of credibility, we are not bound by such findings. Iowa R. App. P. 14(f)(7).

The criteria to be considered in awarding alimony have been codified in Iowa Code section 598.21(3) (1985). While payment of alimony is not an absolute right, it is awarded out of fairness, according to the peculiar circumstances of each case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). Alimony is awarded based on the earning capacity of the parties and present standards of living balanced against the relative needs of the parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 436-37 (Iowa 1981). The spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible. In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). Two of the factors to be given great weight in such a determination are the duration of the marriage and the ability of the supported spouse to engage in gainful employment. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972). In addition, where a spouse has sacrificed her earning ability in order

to make a home for the family and the other spouse has profited thereby, alimony is justified. In re Marriage of Sanders, 255 N.W.2d 109, 111 (Iowa 1977). Although alimony on one hand and allocation of property rights on the other have a different purpose, they are still closely related in the matter of determining the amount to be allowed. In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984).

The parties here were married for only six years. This is not the case of a marriage of extended duration. Both are in good health and have attained approximately the same educational level. We acknowledge that the parties lived fairly well for several years when Kenneth's construction business flourished. However, the economy has changed and the parties were forced to adjust their life-styles accordingly.

Antonia is thirty-seven years old and capable of earning her own support. She was employed and supporting her two children prior to the parties' marriage and worked during the majority of the marriage.

While Kenneth apparently operated a thriving business for a few years, this business also left him in bankruptcy, and he is allocated at least \$170,000 of debt in the dissolution decree. Antonia leaves the marriage without liabilities. Antonia claims that she needs Kenneth to supplement her income so that she can receive medical secretarial training. At this stage, it is apparent that both parties desperately need to learn new skills to survive financially. We cannot justify ordering Kenneth to pay for Antonia's education when he cannot afford to provide for his own.

Antonia has not received child support payments from the father of her children for fourteen years. Her first husband was ordered to pay child support of \$150 monthly, and Antonia has opted not to pursue this financial assistance.

While these circumstances are unfortunate, we will not penalize Kenneth for Antonia's increased living expenses. ²⁴⁵

Given the limited duration of the marriage, the substantial indebtedness allocated to Kenneth, Antonia's ability to support herself, and the speculative nature of Kenneth's earning capacity, we cannot justify an award of alimony to Antonia.

The trial court is vested with considerable discretion in allowing attorney fees to be awarded. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa 1983). The allowance here appears fair and reasonable and should not be disturbed.

In evaluating a request for attorney fees on appeal, the court must consider the needs of the party making the request and the ability of the other to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We order each party to pay their own attorney fees incurred on appeal. Costs are assessed to Kenneth.

AFFIRMED AS MODIFIED.